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Preventing Subdivision Control Evasion in Indiana

PREVENTION OF SUBDIVISION CONTROL EVASION IN INDIANA

Since 1950 there has been an "explosion" in metropolitan population.[1] The greatest growth has been in the area which rings our metropolitan areas.[2] The advance of the suburbs has changed the face of the countryside; shopping centers and residential subdivisions are strewn across the once empty land.[3] This growth has given new impetus to municipal planning and subdivision control. As the amount of subdividing by private promoters increases, the importance of controlling subdividing is emphasized by the frequently tangled street patterns, uneconomic mixing of inconsistent uses, crazy quilts of lot sizes, and poor planning in general.[4]

Awareness of these problems is indicated by the amount of recent legislation[5] and writing on the subject of subdivision regulation.[6] The

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1. The 1960 census returns dramatize the "explosive" population increases that are occurring in metropolitan areas and reveal that over 80% of the nation's total population increase during the last decennial period took place in these areas. Schmandt, *Municipal Control of Urban Expansion,* 29 FORDHAM L. REV. 637 (1961).

2. See Comment, 1961 WIS. L. REV. 310.

3. *Ibid.*

4. HORACK AND NOLAN, LAND USE CONTROLS 202 (1955) (the crazy quilt of lot sizes): Frey, *Subdivision Control and Planning,* 1961 U. ILL. L.F. 411 (poor planning in general).

5. "Every state in the country has enacted enabling legislation allowing communities to undertake planning subdivision controls." Over three-fourths of the cities with more than 10,000 people have adopted local subdivision ordinances. *Id.* at 418.

6. Cunningham, *Control of Land Use in New Jersey under the 1953 Planning Statutes,* 15 RUTGERS L. REV. (1960); Frey, *supra* note 4; Melli, *Subdivision Control in Wisconsin,* 1953 WIS. L. REV. 389; Note 48 KY. L.J. 252 (1960); Note, 36 N.Y.U. L. REV. 1205 (1961).

growth of subdivision control has been rapid, but unfortunately many problems exist, partly as a result of the lack of judicial guidance for the planning commissions.[7]

In directing the growth of a city the best and perhaps the only opportunity for proper imposition of details of planning is at the original subdivision of the raw land.[8] In order that the development of the community be orderly and planned, the planning body must be able to intervene at this critical stage of subdivision development.[9] Among conditions required by planning bodies and upheld are the dedication of land for streets, the grading and paving of these streets, the construction of sewers, curbs, gutters, and other drainage facilities, the dedication of land for parks and playgrounds, and the installation of water mains.[10] If the subdivider does not comply with these requirements then the burden will fall on the municipality to do so.

As municipal budgets mount,[11] planning commissions seek to impose the responsibility for improvements on the subdivider. Consequently, most site improvements presently are made at the subdivider's expense.[12] In addition to these increasing requirements, the subdividers are faced with other problems created by subdivision control. For example, subdividers often complain of being delayed by infrequent meetings of the planning boards. These meetings are usually monthly, and the builder must appear at them, present his subdivision plans, and gain board approval before he can move one shovelful of dirt.[13] The subdivider's major complaint regarding subdivision control procedure is the increase in real estate tax assessment which often accompanies subdivision ap-

7. Frey, *supra* note 4, at 434.

8. See Note, 48 Ky. L.J. 252 (1960).

9. The planning body's authority to do so generally has been upheld. See annot., 11 A.L.R.2d 524, 532 (1950).

10. See, *e.g.*, Yardville Estates, Inc. v. City of Trenton, 66 N.J. Super. 51, 168 A.2d 429 (1961) (construction of water mains); Zastrow v. Village of Brown Deer, 9 Wisc. 2d 100, 100 N.W.2d 359 (1960) (construction of water mains); Green Acres Bldg. Corp. v. Board of Zoning Appeals, 22 Misc. 2d 877, 197 N.Y.S.2d 565 (Sup. Ct. 1959) (construction of sewers); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956) (construction of curbs); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949) (dedication of land for streets); In the Matter of Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y.S. 809 (Sup. Ct. 1931) (dedication of land for playgrounds); Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920) (construction of streets).

11. Each new house in a subdivision requires . . . capital outlays of $2,500 to $3,500 or more . . . only a portion of which is recouped through normal subdivision regulations. . . . evidencing a growing sentiment that new residents should somehow be charged with a greater share of the capital burden . . . some municipalities have sought to increase their building permit fees. . . ." Schmandt, *supra* note 1, at 646.

12. This was not so thirty years ago, when the community was almost solely responsible. Frey, *supra* note 4, at 434.

13. Tilden, *Improved Administration of Subdivision Control*, 46 MASS. L.Q. 201 (1961). The author discusses problems and complaints created by planning commission administration from his experience as a member of a planning board.

proval.[14] Usually the land to be subdivided has been assessed as farm land; but the plans which are submitted to the planning board show a proposed residential or industrial site, and when approval is gained and the subdivider records there may be an increase in the tax assessment. Improvements are generally demonstrably beneficial to the purchaser and therefore the cost for them can be passed on to the purchaser in the form of higher prices without much objection. But taxes may not seem to be beneficial to the purchaser, and they cannot be passed on easily. The problem the increase in taxes poses to subdividers might be such that the subdivider will not plat his land but instead will sell his lots by metes and bounds. By avoiding the higher assessments the subdivider at the same time may avoid altogether the control of the planning body which indirectly controls the subdivision through use of plat approval as a condition precedent to recordation. In such a case, unless the planning body either can make use of other devices to control indirectly all subdivision or has some authority to control directly all subdivision—that is, impose its conditions directly upon subdividers without using plat devices—then the subdivision control legislation of the particular state and municipality is meaningless.

This note will focus upon one method of evasion of subdivision control used by subdividers in Indiana: the transfer of unplatted, subdivided land by metes an bounds without approval of the planning body. It will investigate how this evasion is accomplished and what authority the planning bodies have under present statutes to prevent such transfers by direct and indirect controls.

I. Subdivision Control in General

The whole field of subdivision regulation normally is peculiarly a creature of legislation,[15] and the power to impose legislative controls and regulate the subdivision of land has generally been upheld by the courts.[16] Subdivision control legislation is aimed at governing the physical development of the community and its environs in relation to its social and economic well-being and provides the legal framework within which the community may carry out this objective.[17]

To have effective subdivision control legislation, the legislative body must take into account three interests which are affected by subdivision control. The first interest to be considered is that of the community,

14. Melli, *supra* note 6, at 439.

15. Pennyton Homes, Inc. v. Planning Bd. of the Borough of Stanhope, 197 A.2d 870, 41 N.J. 578 (1964).

16. See annot., 11 A.L.R.2d 524 (1950).

17. Angermeier v. Borough of Sea Girt, 27 N.J. 298, 308, 142 A.2d 624, 629 (1958); 36 N.Y.U. L. Rev. 1205 (1961). See also Note, 48 Ky. L.J. 252 (1960).

whose interest is primarily responsible for the "prompting" of subdivision control legislation. The layout and character of the community may be determined for an indefinite period by the subdivision of its environs.[18] Slums, cramped school areas, and traffic congestion are traceable to the original layout of the community and often to uncontrolled subdividing.[19] As the amount of subdividing increases the municipal budgets are strained by the need to provide new schools, police and fire stations, larger sewer treatment systems, and other local government facilities.[20] The community therefore wishes to obtain a maximum tax yield from the new subdivision, but should the subdivision be improper the area might become a "blighted" one from which tax returns would be low.[21] Should only a few people build homes in the improper subdivision and then petition the municipality for public services the cost of the services might be assessed on all the lots; and the vacant lot owner might find the tax burden more than he wishes to pay and become tax delinquent.[22] Also, in the case where the subdivider has no interest in the land because he has a financial arrangement with the owner, after selling enough lots to make a quick profit he might move on to another promotion and leave the owner the burden of the vacant lots, which are now assessed as building lots.[23] In such a situation the owner frequently loses his holdings in a subdivision tax sale.[24] The burden of the tax delinquency falls upon the city, county, or state taxpayers depending on the working of the law in the particular locality.[25] This factor and the "spotty" development which is common in the case of improper subdivisions combine to make restoration of the unused subdivided lands into a productive economic unit nearly impossible.

The second interest to be considered is that of protection of investment. The buyer and the lender are mutually interested in protecting their investment; control of subdividing can furnish this protection by preserving property values.[26] This interest is illustrated by the interest

18. Melli, *supra* note 6, at 392.
19. HORACK AND NOLAN, *op. cit. supra* note 4, at 202.
20. Schmandt, *supra* note 1, at 637.
21. See Melli, *supra* note 6, at 392 (blighted area); Comment, 1961 WIS. L. REV. 310 (1961) (maximum yield).
22. HORACK AND NOLAN, *op. cit. supra* note 4, at 204.
23. *Ibid.*
24. Aschnan, *Chronically Tax Delinquent Land in Cook County,* 25 LAND ECONOMICS 204 (1946) (250,000 parcels of tax delinquent land in Chicago in 1946).
25. CORMICK, PREMATURE SUBDIVISION OF URBAN LANDS 290 (1938).
26. "By requiring that the original layout be of a type that will maintain its character for a long period of years the community is protecting his [the purchaser's] investment." Melli, *supra* note 6, at 396.

shown by the FHA in the original layout of the subdivision.[27] Furthermore, the buyer does not want to be subject to penalties imposed by the municipality for a violation by the subdivider of subdivision control legislation.[28] This does happen, and the buyer may find his land useless without utilities or find himself subject to fines.[29]

The third interest to be considered is that of the subdivider. The subdivider is a business man who wishes to realize as much profit as he can from the sale of subdivided land in the shortest time possible.[30] This does not mean that the average builder is unaware of his responsibility to the community.[31] Actually most subdividers are interested in good standards because they help them gain better financing and aid them in selling.[32] Good subdivision control protects the subdivider from overdevelopment and from subdivision of areas which are not suitable for development. Inappropriate subdividing frequently brings financial ruin to the subdivider.[33] Planning bodies can prevent this by developing thoughtful municipal growth policies and implementing them through subdivision regulations. The subdivider wants to be protected from having his development surrounded by undesirable developments. Planning bodies, by supervising all subdivision activity, can protect the subdivider from this by imposing good standards on all subdividers and by co-ordinating the planning of all connected development.[34] The subdivider also has a special interest in the timing of required compliance with subdivision regulations. Poor subdivision control which requires the subdivider to complete all improvements and comply with all require-

27. The percentage of subdividers who seek approval has never been established, but one writer states "the vast majority do." McMICHAEL, REAL ESTATE SUBDIVISIONS 140 (1949).

28. For general discussions of enforcement of subdivision legislation, see Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 CORNELL L.Q. 258, 278-80 (1955); Note, 36 N.Y.U. L. REV. 1205, 1212-15 (1961).

29. See Note, 65 HARV. L. REV. 1226, 1236-37 (1952), for a discussion of subjection of purchasers to enforcement procedures of the municipality. The courts have generally protected the buyer where the sale is held illegal. See, *e.g.*, Thomas v. Corwin, 147 Ala. 478, 39 So. 898 (1906); Scott v. Apgar, 238 La. 29, 113 So. 2d 457 (1959). It has been recognized that protection of the buyer is a legitimate use of the police power. *In re* Sidebothem, 12 Cal. 2d 434, 436, 85 P.2d 453, 454 (1939). Buyers also have been protected by statute. See, *e.g.*, N.J. REV. STAT. § 40:55-1.23 (Supp. 1960); R.I. LAWS ANN. § 45-23-13 (1956).

30. Frey, *supra* note 4, at 411.

31. For a discussion of builder's awareness of his responsibilities and an article in his defense see Feinberg, *Subdivision Regulation Pitfalls and Aids for the Real Estate Developer*, A.B.A. SECT. R.P. 13 (1962).

32. Frey, *supra* note 4, at 426.

33. NAT'L ASSOC. OF HOME BUILDERS OF THE U.S., HOME BUILDERS MANUAL FOR LAND DEVELOPMENT (1950).

34. Even where each subdivider is attempting to do a good job in his own subdivision, their uncoordinated planning may have undesirable results. ASCHER, URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES 240 (Woodbury ed. 1953).

ments before the planning body approves the subdivision plan would necessitate expenditure of sums by him prior to the sale of the lots.[35] This could deter the laying out and developing of needed subdivisions until the subdivider is certain that home buyers await completion of the project. Well formulated subdivision control can avoid this. For example, many states allow the subdivider to submit a bond which guarantees payment for improvements, allowing early approval of his plan; and consequently, the subdivider can sell his lots and homes before improvements are made.[36]

II. The Statutory Authority of Indiana Municipalities to Control Subdivisions

A. *The scope of statutory authority to apply indirect controls.*

One of the two principal sources from which Indiana municipalities get authority to control subdividing is the specific power which is granted by statute. The 1947 enabling act establishes the city, town, and county planning commissions "to promote the orderly development of its governmental units and its environs . . ." and declares the objective of the act to be the improvement of "the present health, safety, convenience and welfare of their citizens."[37] After its creation, the planning commission has the duty to adopt a master plan ". . . for the development of the city and such contiguous unincorporated area outside the corporate limits of the city as . . . bears reasonable relation to the development of the city . . . within two miles from the corporate limits of the city. . . ."[38] Should the county have a planning commission established under this act, the city planning commission within the county exercises territorial jurisdiction only over the area within the city's corporate limits unless the ordinance of the board of county commissioners authorizes the municipal planning commission to continue or to establish jurisdiction over the contiguous unincorporated area within two miles of the corporate limits.[39] After the adoption of the master plan the planning commission has the duty to recommend an ordinance containing provisions for subdivision control and the approval of plats and replats[40] to the city council or board of county commissioners, whichever is the appropriate body.[41]

35. Compliance with most minimal requirements—grading, water mains, sanitary sewers—often comprises as much as 20% of the total home cost. McMichael, Real Estate Subdivision 135 (1949).

36. This is the case in Indiana. See Ind. Ann. Stat. § 53-751 (Burns 1964). See also Note, 28 Ind. L.J. 544, 574 (1953), for a listing of every state.

37. Ind. Ann. Stat. § 53-701 (Burns 1964).

38. Ind. Ann. Stat. § 53-734 (Burns 1964).

39. *Ibid.*

40. Ind. Ann. Stat. § 53-745 (Burns 1964).

41. Ind. Ann. Stat. § 53-738 (Burns 1964).

The oldest and most effective method by which plan commissions have applied requirements to effect the purposes of subdivision control is through the plat.[42] The plat device was introduced originally to facilitate land conveyancing[43] by permitting lots to be identified simply by reference to their numbers on the plat, which is a map of a tract of land with lots, streets, alleys, and other details drawn to scale.[44] Recorded plats benefit the municipality as well as the property vendor because they facilitate tax assessment and create more accurate records of land transfers.[45] In addition, most subdivision controls are enforced only indirectly by asking compliance with them as a condition precedent to recording the subdivision plat.[46] However, control of subdividing through this indirect method is rendered ineffective when the subdivider avoids plat recording and municipal control by transferring his land by metes and bounds sales.[47] In this type of transfer the subdivider does not plat his subdivided land but sells each lot separately according to its individual description in terms of metes and bounds. Thus he not only avoids the indirect control of the planning body but also deprives the municipality of the other advantages which accrue to it as a result of platting.

It is arguable that the means to prevent metes and bounds transfers to evade subdivision control are available in the presently existing statutory authority of the plan commission. Section 48-801[48] states that anyone who lays off ". . . *subdivisions of any lots* within the limits of any city or town, shall, previous to the sale of any lots in such . . . subdivision . . . cause to be *recorded* in the recorder's office . . . a correct *plat* of such . . . subdivision." Although this section has never been so interpreted or enforced, it could be taken to require that before lots of a subdivision are sold the land must be platted and recorded. Sections 53-701,[49] 53-732,[50] and 53-703,[51] which grant broad authority

42. *Ibid.;* Note, 65 HARV. L. REV. 1226, 1232 (1952); Note, 48 KY. L.J. 252 (1960). Courts first upheld subdivision control on the theory that legislation could impose any requirement on the privilege of recording the plat. As recording of real property became essential to its disposition, this reasoning was found inadequate. Recording became a "right," and the courts changed to a rationale that the statute was a proper exercise of the police power.

43. "The property owner who proposed to convey sections of a tract in the form of lots was required first to survey the area and make a plat designating streets, easements, and the boundaries of the lots. The map was then recorded, and the lots were conveyed by number, instead of metes and bounds." Note, 29 IND. L.J. 408, 409 (1954).

44. BLACK, LAW DICTIONARY 1309 (4th ed.).

45. See Melli, *supra* note 6, at 411 (accurate records); Note, IND. L.J. 408 (1955) (tax assessment).

46. Reps, *supra* note 28, at 278.

47. Melli, *supra* note 6, at 412.

48. IND. ANN. STAT. § 48-801 (Burns 1964).

49. IND. ANN. STAT. § 53-701 (Burns 1964).

50. IND. ANN. STAT. § 53-732 (Burns 1964).

51. IND. ANN. STAT. § 53-703 (Burns 1964).

to the planning commissions to promote development of the governmental unit and to formulate the policies to be implemented by ordinances, would support the conclusion that the planning commissions have the power under 48-801 to require that all subdivisions of land within their jurisdiction be platted. Since the authority of the commission to enforce subdivision controls indirectly by making them conditions precedent to commission approval of plats for recording is not disputed, if 48-801 is construed to require that all plats of all subdivisions be recorded, the commission's present authority would be adequate to reach all subdivisions.

Even if the all-inclusive 48-801 argument should fail, existing statutes arguably give the commission power to control some metes and bounds subdivisions. In Indiana, as in other states[52] where the enabling acts have been construed to allow indirect control of subdividing through plat approval as a condition precedent to recording, subdividers not only have been avoiding such control by metes and bounds transfers but also have often been displaying a plat for the purpose of metes and bounds sales negotiations. Some states have statutes[53] which forbid this practice, thus allowing the planning commission greater control of subdivisions. The question here arises: does the Indiana act empower the planning commission to prevent the practice and gain more control over platted subdivisions which are later sold by metes and bounds? Although never so construed or enforced, section 49-3242,[54] which provides that "whenever a plat is made of any subdivision . . . outside the corporate limits of any city . . . such plat *shall be submitted* to the board of county commissioners . . . for approval," and section 49-3241,[55] which provides that ". . . any person who may lay out a subdivision of any lots or lands situated outside the corporate limits of any city . . . *shall* prior to the sale of any lots in such subdivision *cause to be recorded* in the office of the county recorder . . . a correct plat of such subdivision . . .," could be interpreted and enforced as requiring approval and recordation of any plat made for any reason within the county plan commission's territorial jurisdiction. The complementary sections for land within city jurisdictions are section 48-801, which provides ". . . any person who may lay off . . . any subdivision of any lots or lands within the limits

52. See Melli, *supra* note 6, at 412-15, for a discussion of subdivision control avoidance by metes and bounds sales.

53. Penalties have been imposed for sale of land when reference during the sales negotiations has been made to an unrecorded plat, *e.g.*, ALA. CODE ANN. tit. 37, § 800 (1959). Many statutes expressly provide sales by metes and bounds will not exempt the transaction, *e.g.*, PA. STAT. ANN. tit. 53, § 22772 (1961).

54. IND. ANN. STAT. § 49-3242 (Burns 1964).

55. IND. ANN. STAT. § 49-3241 (Burns 1964).

to any city . . . *shall,* previous to the sale of any lots . . . *cause to be recorded* in the record's office of the proper county a correct *plat* . . .", and 48-802[56] which provides "whenever a plat is made of any lots or land . . . as a subdivision of any lots or lands within such city . . . such *plat shall be submitted for approval* . . . before the same is offered for record in the recorder's office." Because of their imperative language, these sections could be construed to require subdividers within the city plan commission's jurisdiction to plat their subdivisions, submit them for approval, and cause them to be recorded in the proper county. Section 48-801 and 48-802 lend themselves to a stronger interpretation for the city jurisdiction than do 49-3242 and 49-3241 for the county jurisdiction by seemingly requiring that all subdivisions within corporate limits be platted.

B. *The scope of statutory authority for applying direct subdivision controls*

Indirect controls are limited by definition to the extent of the commission's authority to require that subdivisions be platted and the plats be recorded since it may enforce indirect controls only by withholding plat approval. The commission's authority to require platting under 48-801 may be all-inclusive, but that argument has not been tested. Meanwhile, the continuing evasion of indirect controls suggests that one solution would be direct controls which are not dependent on recording but which might be imposed on subdivisions without reference to whether the subdivision is platted or submitted for approval to the planning commission. The authority of the planning commission to impose such controls under present legislation is not clear.

The planning commission is created by section 53-701 to promote the development of the governmental unit. This section seems to place no restrictions on the commission's authority in acting to improve the present health, safety, convenience, and welfare of the local unit's citizens and in planning for the unit's future development.[57] A special concern to the legislators was that ". . . residential areas provide healthy surroundings for family life . . .",[58] which indicates particular interest in the control of residential development. Moreover, that the 1947 enabling act's[59] intention is one of expansion of the powers of planning boards is indicated by 53-701: ". . . that certain regulatory powers be created over developments affecting public welfare and not otherwise

56. IND. ANN. STAT. § 48-802 (Burns 1963).
57. *Ibid.*
58. *Ibid.*
59. IND. ANN. STAT. §§ 53-701 to -795 (Burns 1964).

controlled. . . ." Section 53-701 authorizes the planning commission to prepare a master plan and formulate policies for the development of public ways and structures, the issuance of improvement location permits on platted and unplatted land, and the laying out of public ways and services. Section 53-732 allows the commission to formulate these three policies but sets no limit upon what policies may be formulated in preparation of the master plan other than those which ". . . assure the promotion of public health, safety, morals, convenience, order, or general welfare for the sake of efficiency and economy in the process of development." This language is very broad and would allow the commission to incorporate into the master plan any subdivision control policies which appear necessary. Section 53-703 defines master plan to include ". . . ordinances as may be deemed necessary to implement such complete master plan . . . and provision for such regulations as are deemed necessary to their enforcement." The only express indication that this ordinance and master plan contain provision for subdivision control appears in section 53-745 which states that ". . . after a master plan and an ordinance, *containing provisions for subdivision control and the approval of plats and replats,* have been adopted . . . a plat of a subdivision shall not be filed with the auditor, and the recorder shall not record it unless it has first been approved by the plan commission. . . ." This section is critical as to whether the broad powers conferred upon the planning commission in sections 53-701, 53-732, and 53-703 to control the development of its governmental unit is limited in the area of subdivision control to only those subdivisions which are platted. Section 53-745 contains the following language: ". . . containing provisions for subdivision control and the approval of plats and replats." Does this phrase modify both "master plan" and "ordinance"? If it modifies only "ordinance" then it would seem a "master plan" could not be limited to containing provisions for subdivision control which are tied to plats. Assuming this phrase does modify both "master plan" and "ordinance," an even more critical ambiguity appears. The phrase, ". . . containing provisions for subdivision control and the approval of plats and replats . . ." consists of two elements: first, "provisions for subdivision control" and, second, provisions for ". . . the approval of plats and replats." Is the relationship of these two concepts such that provisions in the master plan and ordinance relative to "subdivision control" may exist independent from the provisions for "approval of plats and replats"? The fact that section 53-745 states that a ". . . plat of a subdivision shall not be filed with the auditor and the recorder shall not record it unless "approved" adds no weight to the argument that "subdivision control" is tied to "approval of plats" since this clause may be

said to be unrelated to provisions for "subdivision control" to be set forth in the master plan and ordinance and, instead, definitive of the provisions for "approval of plats" which are to appear therein. In aid to the argument that "subdivision control" is more comprehensive than "approval of plats" (although approval of plats of subdivisions is one method by which subdividing can be controlled) is the broad language of sections 53-701, 53-732, and 53-703, which shows the legislative intent to be one of expansion of planning commission power over municipal development. This appears to be a rather circular argument, but it is not without force, for if "subdivision control" is restricted to only the "approval of plats," the objective of this legislation—"to plan for future development"—can be reduced to a nullity in the area of subdivision development by subdividers who sell their lots by metes and bounds.

Further support for the argument that planning bodies are empowered by 53-745 to control directly the subdivision of land is found in the 1963 amendment to 53-745,[60] which added a second paragraph, ". . . any *subdivision of land* for purposes other than agricultural use shall be reviewed by the planning commission having jurisdiction over the area involved and the determination shall be made that *such division* shall be in accordance with the master plan." This section could be construed to have expanded the authority of the planning commission or to have defined its power to be coextensive with the thrust of sections 53-701, 53-732, and 53-703. Thus, under either construction the planning commission is enabled to control unplatted subdivisions directly. In support of this construction, it might be asked why, if the legislature did not intend to expand the authority of the commission, it used the term "subdivision of land" and "such division" in the amendment rather than repeating the prior statutory language, "plats and replats"? As a matter of statutory interpretation, when a legislative body amends a section and uses different terms, not repeating the prior language, a presumption arises that the legislative intent was to enact something different.[61] Here, the words "subdivision of land" and "such division" were used. The crux of this construction problem hinges upon what the legislature meant by using these terms. Subdivision generally is defined as a "division into smaller parts of the same thing or subject-matter."[62] Also, the words "such division" are seen to be synonomous with "subdivision of land" and add weight to the argument that 53-745 is aimed at the division of land rather than platting. This definition of "subdivision"

60. Ind. Acts 1963, ch. 385, § 4.
61. McCaffery, Statutory Construction 155 (1953).
62. Black, Law Dictionary (4th ed. 1951).

is the basis of the definition in all states where the enabling acts define the term.[63] There seems to be no general agreement of how many parts a tract of land must be divided into to constitute a "subdivision" for purposes of the particular statute, but such a determination is a question of how much jurisdiction the plan commission should have.[64] The Indiana enabling act[65] does not define the term "subdivision"; impliedly this is left for the planning body to formulate, allowing them to limit or broaden their jurisdictional powers. In any event, as a matter of definition the term "subdivision of land" cannot be said to be restricted to merely platted subdivisions.

However, planning bodies have interpreted the "plats and replats" language of the first paragraph of section 53-745 as limiting their power to control subdivisions to the indirect method. This argument limiting the commission's power also is supported by 53-750,[66] which speaks of a "master plan and ordinance containing provisions for the approval of plats and replats," and 53-752,[67] which gives exclusive control over the approval of plats within defined jurisdictional limits to the commission. Construing these three sections together gives rise to a negative implication[68] that the commission has authority only over platted subdivisions of land and thus lacks authority to control directly those not platted.

Adding weight to this negative implication, the Attorney General has construed the 1963 amendment to 53-745 as not increasing the authority of the planning commission but rather as limiting its jurisdiction by excluding land which has been subdivided for agricultural uses.[69] The legislature's failure to amend 53-745, 53-750, and 53-752 by eliminating from all three sections the term "plats" and substituting the term "subdivision" might be further indication of the absence of a legislative intention to extend the commission's power to unplatted subdivisions. By leaving those sections functional in terms of "plats and replats" it seems that the legislature may not have intended to expand the authority of the commission by the 1963 amendment.[70] Whether this

63. ILL. REV. STAT. ch. 109, § 1 (1961) (two lots); ORE. REV. STAT. § 92.010 (1957) (two, three, and four lots); WIS. STAT. § 236.02 (1962) (five lots).

64. It has been held that defining "subdivision" as a division into two parts is an unreasonable extension of the police power. Kass v. Lewin, 104 So. 2d 572, 578 (Fla. 1958).

65. IND. ANN. STAT. §§ 53-701 to -795 (Burns 1964).

66. IND. ANN. STAT. § 53-750 (Burns 1964).

67. IND. ANN. STAT. § 53-752 (Burns 1964).

68. The general rule of statutory construction is "expressio unis est exclusio alterius." That is, specific mention of one thing implies exclusion of other things. MCCAFFERY, *op. cit. supra* note 99, at 50.

69. IND. ATT'Y GEN. OPS. 255 (1963).

70. "To determine the color of a word or phrase in a statute, it is essential to examine the context in which it is set. One must study every word of the contemplated

and the Attorney General's opinion rebut the presumption that the 1963 amendment to 53-745 expanded or defined the authority of the planning commission to include control of unplatted subdivisions remains at least arguable, however.

Of course, the Attorney General's opinion is rendered moot if the argument that prior to the 1963 amendment the planning commission had power to control unplatted subdivisions is sound. If the commission had the power to control unplatted subdivisions prior to the 1963 amendment, then the question of whether or not the 1963 amendment to 53-745 expanded the power of the commission over unplatted subdivisions is irrelevant.

If the validity of direct controls is established and a commission does impose them, it will have to make provision for their enforcement since the withholding of plat approval obviously will not serve as a means of enforcing direct controls. One method which might be used to enforce not only direct controls but also platting and recording requirements in connection with indirect controls is the denial of improvement location permits for proposed structures on lots which have access only from unapproved streets until such structure is approved by the commission. While planning bodies have assumed the legality of this, the courts are divided. Ordinances enacted authorizing planning commissions to condition the issuance of permits on approval of proposed structures have been attacked as vesting "arbitrary power in a public official which may be used in the interests of some to the exclusion of others" and as therefore unreasonable and void.[71] Similar ordinances have been upheld as being both constitutional and a lawful delegation of legislative power to the planning body.[72] By virtue of 53-732 the planning commission is given the authority to formulate the policies for the issuance of improvement location permits for platted and unplatted lands and for the development and laying out of public and private ways, all of which shall be contained in the master plan, and 53-703 establishes the commission's authority to enact ordinances pursuant to the master plan to enforce it.

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bill in its relation to the other language accompanying it." McCAFFERY, *op. cit. supra* note 63, at 27.

71. See People *ex. rel.* Schimpff v. Norvell, 368 Ill. 325, 13 N.E.2d 960 (1938), holding that any ordinance vesting in a public official arbitrary power which might be used in the interests of some and to the exclusion of others is unreasonable and void.

72. See Mitchell v. Morris, 94 Cal. App. 2d 446, 210 P.2d 857 (1949) (court upheld ordinance, saying that there was no unlawful delegation of legislative power and that the exercise of the discretionary powers of the planning body to grant permits is an exercise of quasi-judicial power and not an exercise of legislative power). Some states have provided by statute that the issuance of building permits may be prohibited or regulated where a lot abuts an unaccepted street. See, *e.g.*, CONN. REV. STAT. §§ 8-27 (1958), KAN. REV. STAT. § 13-1112 (1957).

This means that the planning commission can enact an ordinance granting itself the power to approve proposed structures and to grant or deny permits to applicants accordingly. This proposed use of improvement location permits also suggests that the planning commission might use them to enforce the suggested constructions of the statute which require the subdivider to plat. For example, 48-801 provided" . . . any person who may lay off . . . any subdivision . . . shall . . . cause to be recorded . . . a correct plat."

The commission also is given the authority to formulate policies for the laying out and development of public services[73] such as sewers, water, gas. Like the improvement location permit, public services can be utilized as an enforcement "tool" which may be withheld until requirements are met and might be used by the planning commission to enforce 48-801 by requiring the subdivider to plat. Although such use of these services has not been the subject of litigation in Indiana, for the sake of furthering the policies and objectives set forth in enabling act[74] and master plan adopted pursuant to it, the commission might be justified in using them as a means for enforcing controls.

However, withholding building permits or public services as methods of enforcing and imposing requirements on subdividers presents two serious practical problems. First, it would place a heavy burden on the official who is to issue permits or extend utilities to determine to which applicant these policies apply. The fact that the particular lot is located upon unapproved subdivided land will not be evidenced by the application for permit or public services. Second, if requirements are enforced in this manner they may penalize the purchaser rather than the subdivider.

Zoning, of course, to a certain extent affects subdivisions whether or not they are platted.[75] Where the municipality is menaced by excessive

73. IND. ANN. STAT. § 53-732 (Burns 1964).

74. IND. ANN. STAT. § 53-701 to -795 (Burns 1964).

75. The courts have handled subdivision control cases in much the same manner as they have zoning cases. Since the Supreme Court has not dealt directly with subdivision control, the courts rely on the classic zoning case of Village of Euclid v. Ambler, 272 U.S. 365 (1926). The Court held that a zoning ordinance was valid unless it was "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals and general welfare," *id.* at 395; and this standard also applies to municipal attempts to control subdivisions under the police power. Zoning and subdivision legislation are somewhat related in that they both attempt to control the development of the municipality by limiting what the owner may do with his land. See Note, 65 HARV. L. REV. 1226, 1227 (1952). Zoning relates to the type of building development and subdivision control relates to the way land is divided and made ready for development. The two are mutually dependent because the character of the use to be made of the land cannot be separated from the layout of the area. See Melli, *supra* note 6, at 389. Zoning and subdivision control differ as preventive measures in that zoning requirements are generally negative prohibitions on uses while subdivision control requirements are usually positive exactions from the owner. See Reps & Smith, *Control of Urban Land Subdivision,* 14 SYRACUSE L. REV. 405, 407 (1963).

subdividing, the commission can eliminate this problem by zoning the district for a use less intensive than residential, such as agricultural, or by zoning it as a flood plain and thus eliminating all building activity.

III. The Implied Authority of Municipalities to Control Subdivision

Should express authority for direct subdivision controls be found wanting in existing planning and zoning legislation, municipalities may be able to base direct subdivision controls on a second source of authority: implied police power. Police power may be implied from specific grants of authority to town trustees and city councils,[76] or it may be implied from the creation of the municipal corporation. The Indiana Supreme Court has declared:

> The police power primarily inheres in the state; but the legislature may and in common practice does delegate a large measure of it to the municipal corporations. The power may be conferred in express terms, *or it may be inferred from the mere fact of the creation of the corporation.* The so-called inferred or inherent policy powers of such corporations are as much delegated powers as those conferred in express terms, the inference of their delegation growing out of the fact of the creation of the corporation, and the additional fact that the corporation can only fully accomplish the objects of its creation by exercising such power. . . .
>
> Among the implied powers passed to the municipal corporation is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life and property.[77]

In view of the importance of subdivision control to the future well-being of communities, it is not unreasonable to contend that authority to exercise such control falls within this definition of the implied police power of municipalities and that municipalities may lawfully delegate such authority to their planning commissions. Although precedent on the use of the implied power to control land use is scant, an ordinance specifying the minimum size of tourist camp sleeping rooms and limiting the length of time a person could remain a resident of such camps was upheld as a proper exercise of the police power in *Spitler v. Town of Munster.*[78] The court affirmed the implied power of the town to require a citizen to

76. See Ind. Ann. Stat. §§ 48-301 (towns), -1407 (cities) (1963) for the powers specifically granted to municipalities.

77. City of Crawfordsville v. Braden, 130 Ind. 149, 154-55, 28 N.E. 849, 851 (1891).

78. 214 Ind. 75, 14 N.E.2d 579 (1938).

use his property so as not to defeat reasonable regulations established by the municipality for the protection of the lives, health, and property of its residents. Reasonable regulation of the subdivision of land would certainly be no more restrictive than the regulation upheld in *Spitler,* and a substantial case can be made for the proposition that subdivision control is quite as necessary and appropriate to the long-range protection of health and property as the ordinance in that case.

However, the very existence of the present statutory scheme for local planning commissions may pose a bar to the establishment of the implied police power to control subdivision. The 1947 enabling act[79] may circumscribe the scope of municipal activity in this matter and deny to the municipality any authority to control subdivision other than that delegated to it by the statute. But this preemption argument can be met; in fact, the argument is somewhat self-defeating. If the enabling act[80] gives the planning commission power to control subdivision directly, the preemption question is rendered moot. The implied police power rationale need be invoked only if it is decided that the enabling act[81] confers only the authority to control subdivision indirectly through control of the recording of plats. It may then be contended that although the act[82] may completely cover the area of indirect controls, it does not deal at all with direct controls and consequently does not limit the local unit's authority, based on its implied police power, to use this most effective method.

In addition to statutory powers and implied powers, Indiana municipalities are endowed with some authority under a sort of residuum of power theory. A line of cases has held that since the people had authority to govern their own local affairs prior to the existence of the state, the state has only that authority over local affairs which is specifically given it by the constitution.[83] Consequently, the municipalities have power to regulate purely local matters. In invoking this principle, the essential fact to be established is that the activity to be regulated is strictly a local matter. It could be argued that subdivision control is a purely local matter and that the state legislature has recognized that it is a purely local matter by not attempting either to specify what controls should be imposed on subdivisions or to require commissions to control subdivisions at all.

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79. IND. ANN. STAT. § 53-701 to -795 (Burns 1964).
80. *Ibid.*
81. *Ibid.*
82. *Ibid.*
83. See State *ex rel.* Jameson v. Denny, 118 Ind. 382, 21 N.E. 252 (1888); City of Evansville v. State *ex rel.* Blend, 118 Ind. 426, 21 N.E. 267 (1888); State *ex rel.* Holt v. Denny, 118 Ind. 449, 21 N.E. 274 (1888). See generally, Conrad, *Indiana Municipalities and the State Government,* 4 IND. L.J. 231 (1929).

IV. Other Solutions to the Problem of Subdivision Control Evasion

If planning commissions presently do not have the authority, either express or implied, to control and prevent metes and bounds subdivisions, then authority could, of course, be provided by amendment of the present enabling act. For "strong-arm" prevention of metes and bounds sales it might be desirable to amend by revising the 1935 subdivision control statute, which stated:

> . . . no plat of a subdivision of land . . . or part shall be filed or recorded until . . . approved by such commission. . . . [N]o conveyance of any parcel of ground less than 2 acres . . . shall be filed or recorded until the written approval of such commission . . . unless . . . parcel . . . comprises . . . one entire lot . . . within a subdivision already approved. . . .[84]

This section was repealed by the 1947 enabling act.[85] One writer[86] states that it was repealed because of the feeling that such metes and bounds sales of subdivided property could not be so prohibited. However, it appears that there was no real question as to this statute's legality; its repeal may more realistically be credited to the lobbying of pressure groups, such as real estate promoters and developers who desired looser control upon their development activities. As long as there is no question of the section's legality, some variation of this section would be helpful in eliminating all such sales. For example, the basic subdivision control section, 53-745, could be amended to require approval of all lots in a subdivision prior to their sale.

To strengthen both this possible amendment and the present statute, the statute also might be amended to define "subdivision" as a division of a parcel of land into a specified number of lots. This would allow application of the term "subdivision" to both platted and unplatted subdivisions, would strengthen the proposition that planning commissions presently have authority to control directly the subdividing of land, and, in the case of the amendment, would remove any ambiguity as to the commission's authority.

Another method of decreasing the problem of land sale by metes and bounds under present statutes would be to make platting a more attractive prospect than it is presently. To offset the burdens which subdivision control requirements may impose upon the subdivider, the commission

84. Ind. Acts 1935, ch. 268, § 9.
85. Ind. Ann. Stat. §§ 53-701 to -795 (Burns 1964).
86. Reps, *supra* note 28, at 279 (citing no authority).

may approve plats of subdivisions in which improvements have not yet been made, if, pursuant to 53-751,[87] the applicant provides a bond. As a practical matter, this makes platting more appealing to the subdivider by delaying certain financial burdens, since by virtue of the bond the subdivider can gain commission approval before required improvements are made and can commence selling the lots and make the improvements as he sells the lots and is better able financially to do so.

A frequent reason given for not platting the subdivision is the increase in real estate tax as a result of platting. As the ability to post a bond makes platting more appealing by delaying certain expenses to the subdivider, so might a reworking of the tax assessment standard. One approach to assessment revision would be statutory prohibition of any increase in the assessed tax valuation of property resulting from platting for a period of "X" years. This would mean that when a plat is recorded the assessment of the land, usually assessed as "acreage," would only increase in assessment as the subdivider constructed improvements on it, rather than be assessed as a residential site immediately upon plat recordation. A second solution might be found in an informal assessment arrangement. The assessment supervisor could instruct the assessors that, until a large number of the lots are sold, the assessment should be increased only by the actual cost of improvements actually made (for example, curbs and streets).

V. Conclusion

A good subdivision control program benefits the public, future residents, and the community as a whole. If the planning commission's control can be avoided by subdividers' selling their lots by metes and bounds, then the program's effectiveness is reduced to a nullity and the community, present and future, suffers.

It is suggested that there are grounds in the present statute for concluding that planning boards presently have the authority to control unplatted as well as platted subdivisions of land and that planning commissions should not hesitate to assert control of all subdivision activity for the betterment of their communities. There are few decisions to guide resolution of the more controversial aspects of subdivision control, but in the past decade the courts have taken a more sympathetic view of community planning.[88] The Supreme Court of Indiana[89] has indicated an

87. Ind. Ann. Stat. § 53-751 (Burns 1964).

88. Berman v. Parker, 348 U.S. 26 (1954), held that the condemnation of property pursuant to the District of Columbia Redevelopment Act of 1945 was for a public purpose and consistent with due process of law and that the delegation of authority in the act was qualified with sufficient standards. The court stated that the District of

interest in the enactment of codes for municipal development and recognized the community's related responsibility in the matter. It is reasonable to conclude that the Indiana courts would follow the trend toward recognizing more liberal methods of subdivision control and would be favorably disposed toward statutory determinations and municipal enactments which broaden planning commission authority.

Indiana planning commissions should approach the exercise of subdivision control powers with an expectation of judicial acquiescence, implementing any device or statutory construction which they think reasonable to cope with the problems presently existing. As long as this exercise is reasonable and is really necessary to the public welfare, the commissions should experience little difficulty in defending and effectuating their controls.

Columbia's police power comprehends wide discretion in the acquisition and redevelopment of large blocks of land. The court indicated that the police power embraces redevelopment for the general objective of achieving a "well-balanced," more attractive community. *Id.* at 33. The Supreme Court in this case seems to extend the police power into new areas by use of this language. This case indicates that the constitution will accommodate a wide range of community planning devices as the local governments seek new ways to meet the problems of growth.

89. Knutson v. State *ex rel.* Seberzer, 239 Ind. 656, 669, 157 N.E.2d 469, 473 (1959).